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STATE OF WASHINGTON

BY
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No. 46690-2-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

GABRIELLE NGUYEN-ALUSKAR,

Plaintiff-Appellant,

v.

CHICAGO TITLE INSURANCE COMPANY, a successor in interest to
TICOR TITLE INSURANCE COMPANY, INC.,

Defendant-Respondent.

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(The Hon. Elizabeth Martin)
Case No. 13-2-07071-1

BRIEF OF RESPONDENT

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I. INTRODUCTION

Plaintiff-Appellant Gabrielle Nguyen-Aluskar raises two alleged errors by the trial court in her appeal – one, that the trial erred in failing to consider new evidence when Ms. Nguyen-Aluskar moved for reconsideration and two, that the trial court erred in not recognizing a facial legal error in the arbitration award. Neither alleged error has merit.

Contrary to Ms. Nguyen-Aluskar's contention, the trial court did consider her new evidence on the motion for reconsideration. There was no motion to strike that evidence and it was in the record. Moreover, even if the trial court had failed to consider the new evidence, there was no abuse of discretion for multiple reasons. The trial court has discretion not to consider an argument raised for the first time on reconsideration. The new evidence was a settlement offer, not admissible into evidence. And, the motion for reconsideration was not timely served – in itself, a valid reason for denial of the motion.

Further, the trial court's review of the arbitration award in this case was limited to review of one sentence, awarding attorneys' fees as damages for breach of contract. The law is well settled that there was no legal error in that award. Thus, the trial court did not abuse its discretion when it confirmed the arbitration award and denied Ms. Nguyen-Aluskar's motion to vacate the arbitration award.

For all these reasons, the trial court's orders should be affirmed.

II. STATEMENT OF THE CASE¹

Plaintiff-Appellant Gabrielle Nguyen-Aluskar filed the complaint in this action on March 8, 2013. CP 134-38. Her counsel was Thaddeus P. Martin of the Law Offices of Thaddeus P. Martin, LLC. On Friday, January 10, 2014, Ms. Nguyen-Aluskar, Chicago Title and their respective counsel held a mediation with The Hon. Paris Kallas, ret. of Judicial Dispute Resolution, and entered into a CR 2A Agreement. CP 19.

On Monday, January 13, 2014, Mr. Martin informed defense counsel that Ms. Nguyen-Aluskar had a change of heart over the weekend, and no longer wanted to comply with the CR 2A Agreement. He said that Ms. Nguyen-Aluskar had discovered that Chicago Title's counsel, Janis G. White, had worked as an attorney at Lane Powell at the same time that Ms. Nguyen-Aluskar was represented by Lane Powell in 2012 (prior to her representation by Mr. Martin and prior to the filing of this lawsuit).

¹ Respondent Chicago Title Insurance Company ("Chicago Title") filed a Motion to Strike portions of the Statement of the Case in Ms. Nguyen-Aluskar's Opening Brief because they did not contain references to the record or because they were argument. This Court granted the motion in part. Ms. Nguyen-Aluskar filed an Amended Statement of the Case on July 27, 2015 that now contains citations to the record. However, many of the citations do not support the statements in the Statement of the Case. Rather than delay consideration of the appeal by making another motion, Chicago Title requests that the Court not consider any statements in Ms. Nguyen-Aluskar's Amended Statement of the Case that are not supported by the record citations she has provided.

Defense counsel immediately informed Mr. Martin that she had not worked on Ms. Nguyen-Aluskar's matter at Lane Powell, had not been aware of Ms. Nguyen-Aluskar's matter when she was employed at Lane Powell, and had not learned any confidential or privileged information belonging to Ms. Nguyen-Aluskar when she worked at Lane Powell. Mr. Martin stated that he now had a conflict and would seek to withdraw. CP 141-42. On January 17, 2014, the Court heard and granted Plaintiff's Motion to Shorten Time to Continue Trial Date and Withdrawal of Attorney. CP 148.

On January 21, 2014, Ms. Nguyen-Aluskar sent Ms. White an email in which she suggested that Ms. White had violated Washington Rule of Court 1.8(b) and Rule 1.8 Comment 20. In her January 21, 2014 email, Ms. Nguyen-Aluskar stated:

For the reasons set forth above, I respectfully demand that Chicago Title waives their right to enforce CR2A Agreement and re-open negotiations of further settlement. Please, I rather not consider these ethical rules by defense counsel to have been violated and accordingly, report the matter to the state Bar. This is an ethical breach and possibly fraud.

CP 153-54.

Counsel for Chicago Title was not able to communicate with Ms. Nguyen-Aluskar until January 27, 2014, when her counsel's Notice of

Withdrawal had expired. On January 27, 2014, counsel for Chicago Title informed Ms. Nguyen-Aluskar via email that “[Chicago Title] has decided not to move to enforce the CR 2A Agreement, and plans to try [the] case on the new trial date, April 23, 2014. [Chicago Title] is not interested in re-opening settlement negotiations.” CP 156.

Following further email exchanges, Ms. Nguyen-Aluskar wrote the following email to defense counsel on January 29, 2014:

Yes, that is correct I did inform Thad Sunday evening via email on January 12 that I believe the [CR2A] Agreement has now become null and void on grounds I discovered you were a Partner in the firm that originally represented me to this specific case.

CP 159.

On or about January 30, 2014, Ms. Nguyen-Aluskar, *pro se*, filed a Motion to Reset Mediation or Settlement Conference and Address Defense Counsel Position if Appropriate to Disqualify. CP 1-6. In her motion, Plaintiff argued that defense counsel should be disqualified because she “was a Partner in a law firm that originally was plaintiff’s legal team to this specific case.” CP 1. Plaintiff also asked “for this Court to set a new Mediation or an Order for a Settlement Conference.” CP 2.

Chicago Title responded to the motion and appeared for oral argument. CP 7-13. The Court denied the motion in its entirety on February 7, 2014. CP 14-15.

Ms. Nguyen-Aluskar then sought to negotiate a new settlement with Chicago Title. On February 11, 2014, Ms. Nguyen-Aluskar sent defense counsel a new settlement proposal that was materially different from the agreement that had been reached in the CR 2A Agreement. Chicago Title rejected the proposal and again notified Ms. Nguyen-Aluskar that Chicago Title intended to try the case. CP 149.

On February 20, 2014, defense counsel received a letter from the WSBA Office of Disciplinary Counsel transmitting a Grievance filed by Ms. Nguyen-Aluskar against defense counsel. Defense counsel responded to the Grievance on March 4, 2014. The WSBA Office of Disciplinary Counsel has not issued a ruling. CP 149-50.

Represented by new counsel, Ms. Nguyen-Aluskar changed her position and moved to enforce the CR 2A Agreement. The motion was granted on April 25, 2014. The Court's Order provided in pertinent part: "The defendant may seek any remedies available pursuant to the terms of the CR 2A Settlement Agreement before Hon. Paris Kallas." CP 45-46.

Chicago Title requested arbitration before Judge Kallas, which was granted. On June 6, 2014, Judge Kallas issued an Arbitration Order and

on June 18, 2014, Judge Kallas issued an Arbitration Award. CP 53-54 and 56-58. Judge Kallas awarded Chicago Title "\$12,125.00 in reasonable attorney fees as damages for Plaintiff's breach of the CR 2A Agreement." CP 56.

On July 18, 2014, the trial court granted Chicago Title's Motion to Confirm Arbitration Award and Enter Judgment, Direct Disbursal of Funds From Court Registry and for Dismissal of All Claims With Prejudice and denied Plaintiff's Motion to Vacate Arbitration Order and Arbitration Award. CP 70-71 and 168-70.

Following her new counsel's withdrawal, Ms. Nguyen-Aluskar, *pro se*, filed a Motion for Reconsideration. The trial court denied the motion on August 15, 2014. CP 130-31.

This appeal followed. CP 171-80.

III. ARGUMENT

A. The Trial Court Acted Within Its Discretion When It Denied the Motion for Reconsideration

Ms. Nguyen-Aluskar's Assignment of Error No. 1 states as follows: "The trial court erred in failing to consider new evidence brought to the trial court's attention by Ms. Nguyen-Aluskar in her motion for reconsideration." Opening Brief at 6. Specifically, Ms. Nguyen-Aluskar argues that the trial court failed to consider an email, dated May 1, 2014, sent by Chicago Title's attorney to Ms. Nguyen-Aluskar's attorney in the

course of settlement negotiations. Opening Brief at 12, 14, 15-16, 20-21, 23. The email proposed, *inter alia*, that as part of a new settlement with materially different terms from the prior CR 2A Agreement, Ms. Nguyen-Aluskar should drop her bar grievance against Ms. White and provide Ms. White with a release. CP 84-85.²

The standard of review of the denial of a motion for reconsideration is well settled and requires a showing of manifest abuse of discretion by the trial court:

“Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court’s ruling absent a showing of manifest abuse of discretion.” *Wilcox v. Lexington Eye Inst.*, 130 Wash. App. 234, 241, 122 P.3d 729 (2005). An abuse of discretion exists only if no reasonable person would have taken the view the trial court adopted, the trial court applied the wrong legal standard, or it relied on

² Ms. Nguyen-Aluskar characterizes the email as an improper demand that she drop her bar grievance against Chicago Title’s counsel and pay attorneys’ fees as a condition to Chicago Title’s agreement to comply with the CR 2A Agreement. Ms. Nguyen-Aluskar’s characterization ignores the fact that after the negotiation of the CR 2A Agreement in January 2014, both she and her first attorney told Chicago Title’s attorney that Ms. Nguyen-Aluskar believed the CR 2A Agreement was null and void and that she would not comply with the CR 2A Agreement. CP 141-42 and 159. In that context, and in an effort to resolve the disputes that arose after the negotiation of the CR 2A Agreement, counsel for Chicago Title proposed as part of a new settlement agreement that Ms. Nguyen-Aluskar agree to dismiss her bar grievance against Ms. White. CP 84-85.

unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wash.2d 664, 668-69, 230 P.3d 583 (2010).

Fishburn v. Pierce County Planning and Land Svcs. Dep't, 161 Wn. App. 452, 472, 250 P.3d 146, *rev. denied*, 172 Wn.2d 1012 (2011).

The trial court did not abuse its discretion when it denied Ms. Nguyen-Aluskar's Motion for Reconsideration. First, contrary to Ms. Nguyen-Aluskar's Assignment of Error No. 1 and argument in her Opening Brief, the trial court **did** consider the May 1, 2014 email from Ms. White. Ms. Nguyen-Aluskar submitted the email as part of her Motion for Reconsideration and it was not stricken by the trial court. CP 84-85. Thus, because the May 1, 2014 email was before the trial court on the Motion for Reconsideration, the trial court could not have erred by failing to consider the email. There was therefore no abuse of discretion.

In addition, even if the trial court had declined to consider the May 1, 2014 email, that would not be an abuse of the trial court's discretion. "Generally, new theories of the case presented as part of a motion for reconsideration need not be considered." *Hook v. Lincoln County Noxious Weed Control Bd.*, 166 Wn. App. 145, 158, 269 P.3d 1056 (2012); *see also River House Dev., Inc., v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012) ("The trial court's discretion extends to

refusing to consider an argument raised for the first time on reconsideration absent a good excuse.”).

Plaintiff raised the May 1, 2014 email for the first time on her Motion for Reconsideration, and thus, it was within the trial court’s discretion to decline to consider the email.

The trial court was also within its discretion to decline to consider the May 1, 2014 email because it was an inadmissible settlement offer. ER 408 provides in pertinent part: “Evidence of conduct or statements made in compromise negotiations is ... not admissible.” *See, e.g., Laue v. Estate of Elder*, 106 Wn. App. 699, 709-10, 25 P.3d 1032 (2001), *rev. denied*, 145 Wn.2d 1036 (2002) (excluding letter which was an offer of settlement).

Further, the trial court could have denied the Motion for Reconsideration because it was not timely served. A motion for reconsideration under CR 59(a) must be served and filed within ten (10) days after entry of the order. CR 59(a). This deadline may not be extended by the court. CR 6(b).

The trial court’s Orders granting Chicago Title’s Motion to Confirm the Arbitration Award and denying Ms. Nguyen-Aluskar’s Motion to Vacate the Arbitration Award were entered on July 18, 2014. CP 70-71 and 168-70. Ms. Nguyen-Aluskar filed her Motion for

Reconsideration within ten (10) days, on July 25, 2014, but failed to serve the Motion for Reconsideration until July 30, 2014, more than ten (10) days after entry of the July 18, 2014 Orders. CP 116. For this reason alone, Plaintiff's Motion for Reconsideration should have been denied. *E.g., Schaefco, Inc. v. Columbia River Gorge Commission*, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993) (denying motion for reconsideration that was timely filed, but not timely served); *Kaech v. Lewis County Public Utility District No. 1*, 106 Wn. App. 260, 268, 23 P.3d 529 (2001) (denying motion for reconsideration that was not served within ten (10) days), *rev. denied*, 145 Wn.2d 1020 (2002).

In sum, because the trial court's denial of Ms. Nguyen-Aluskar's Motion for Reconsideration was within the trial court's discretion and because the motion was not timely served, this Court should affirm the trial court's order.

B. The Trial Court Correctly Confirmed the Arbitration Award

Ms. Nguyen-Aluskar's Assignment of Error No. 2 states as follows: "The trial court erred in not recognizing a facial legal error contained in an arbitration decision/award." Opening Brief at 6. Specifically, Ms. Nguyen-Aluskar complains that "the trial court erred and abused its discretion in its application of law during a narrow review of a private arbitration decision and award, by failing to recognize the lack of

any contractual provision pertinent to a breach of contract and attorney's fees contained in a settlement agreement, and the corresponding language contained in the arbitration decision and award; thus, awarded the respondent-defendant's attorney's fees in contract." Opening Brief at 6-7.

Under the Washington Arbitration Act, an arbitration award can be vacated based on "legal error." RCW 7.04A.230(d). "[T]he facial legal error standard is a very narrow ground for vacating an arbitral award. ... [C]ourts do not look to the merits of the case, and they do not reexamine evidence." *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 239, 236 P.3d 182 (2010); *see also Davidson v. Hensen*, 135 Wn.2d 112, 118-19, 954 P.2d 1327 (1998). "The error should be recognizable from the language of the award, as, for instance, where the arbitrator identifies a portion of the award as punitive damages in a jurisdiction that does not allow punitive damages." *Federated Servs. Ins. Co. v. Pers. Representative of the Estate of Norberg*, 101 Wn. App. 119, 124, 4 P.3d 844 (2000), *rev. denied*, 142 Wn.2d 1025 (2001).

The Arbitration Award in this case was set forth in Para. 1: "Having conducted an independent review, and with the Lodestar factors in mind, Chicago Title is awarded \$12,125.00 in reasonable attorney fees as damages for Plaintiff's breach of the CR 2A Agreement." CP 56. The trial court's review of the award was limited to review of that sentence.

See Westmark Properties, Inc. v. McGuire, 53 Wn. App. 400, 403-04, 766 P.2d 1146 (1989) (award was contained in two sentences of arbitrator's three-page letter; "Judicial scrutiny stops here.").

The law is well settled that attorneys' fees may be awarded as damages for breach of contract. *E.g.*, *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 86, 90, 285 P.3d 70, *rev. denied*, 175 Wn.2d 1015 (2012) (attorneys' fees can be awarded as damages if "proven by competent evidence at trial, just as must be any other element of damages."); *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 162 P.3d 1153 (2007) (attorneys' fees awarded as damages for breach of a contractual indemnity provision); *see also Rorvig v. Douglas*, 123 Wn.2d 854, 873 P.2d 492 (1994) (attorneys' fees awarded as damages in slander of title case); *Cecil v. Dominy*, 69 Wn.2d 289, 291, 418 P.2d 233 (1966) (attorneys' fees as damages in dissolving a wrongfully issued temporary injunction); *Wells v. Aetna Ins. Co.*, 60 Wn.2d 880, 882, 376 P.2d 644 (1962) (attorneys' fees as damages in wrongful action by a third person subjecting a party to litigation); *James v. Cannell*, 135 Wash. 80, 82-83, 237 P. 8 (1925) (attorneys' fees awarded in wrongful garnishment action), *aff'd*, 139 Wash. 702, 246 P. 304 (1926).


Since the law is well settled that attorneys' fees can be awarded as an element of damages, the trial court did not abuse its discretion when it granted Chicago Title's Motion to Confirm the Arbitration Award and denied Ms. Nguyen-Aluskar's Motion to Vacate the Arbitration Award. Accordingly, this Court should affirm the trial court's orders.

IV. CONCLUSION

For all the foregoing reasons, this Court should affirm the trial court's orders denying Ms. Nguyen-Aluskar's Motion for Reconsideration, granting Chicago Title's Motion to Confirm the Arbitration Award, and denying Ms. Nguyen-Aluskar's Motion to Vacate the Arbitration Award.

RESPECTFULLY SUBMITTED this 31st day of July, 2015.

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